UNITED
NATIONS

AT

Administrative Tribunal

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ADMINISTRATIVE TRIBUNAL

Judgement No. 613

Case No. 641: BESOSA

Against: The Secretary-General of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Samar Sen, Vice-President, presiding; Mr. Ioan Voicu; Mr. Francis Spain;

Whereas at the request of Jeanette Elizabeth Besosa, a staff member of the United Nations Children's Fund, hereinafter referred to as UNICEF, the President of the Tribunal, with the agreement of the Respondent, successively extended to 15 July, 31 October, 29 November and 19 December 1991, the time-limit for the filing of an application to the Tribunal;

Whereas, on 18 December 1991, the Applicant filed an application requesting the Tribunal:

"...

5. (1) To declare the present appeal receivable;

(2) To adjudge that the decision not to select the Applicant as the successful candidate was procedurally flawed because extraneous considerations were brought into the selection process;

(3) To find that there was prejudice against the Applicant caused by procedural mistake;

(4) To rule that the decision not to select the Applicant as the successful candidate was tainted with prejudice;

(5) To adjudge and declare that the Applicant was denied due process due to procedural irregularity in the selection process;

(6) To find that the Applicant was treated in an arbitrary and discriminatory manner which precluded her selection as the successful candidate for the post;

(7) To order the Respondent to pay the Applicant damages in the amount of one year of net salary, for violation of the terms of her permanent appointment, for lack of due process, for discrimination, for prejudice and for the sense of injustice engendered in the Applicant;

(8) To order the Respondent to assign the Applicant a post and grade equivalent to the post 00666 in UNICEF."

Whereas the Respondent filed his answer on 26 February 1992;

Whereas the Applicant filed written observations on 15 April 1992;

Whereas, on 14 June 1993, the Tribunal put questions to the Respondent, to which he provided answers on the same date;

Whereas the facts in the case are as follows:

The Applicant entered the service of UNICEF on 8 November 1971, as a Clerk-Typist in the Administrative Division at Headquarters in New York. She was initially given a fixed-term appointment at the G-2 level, which was converted to a probationary appointment, with effect from 8 February 1972. On 1 November 1973, her appointment became permanent. During the course of her employment with UNICEF, the Applicant received successive promotions, reaching the G-6 level, on 1 January 1992, with the functional title of Senior Statistical Clerk.

On 16 June 1989, the Division of Personnel issued a Vacancy Announcement for the G-7 post of Senior Statistical Assistant. Twelve staff members applied, including the

Applicant. The vacancy announcement listed as "minimum qualifications" for the post, the following "special skills": "Advanced Wang word processing and Lotus 1-2-3 skills. Ability to work with various computer systems (e.g., IBM, DOS, Base III and SPF/PC text editor). Ability to transfer data from VS system to PC."

A Selection Advisory Panel (SAP), consisting of a representative of the New York Appointment and Placement Committee (APC), together with a representative of the Division of Personnel and a representative of the Programme Division, met on 6 Septembert 1989, to consider the applications for the post. According to the record, the SAP interviewed the Applicant. In that interview, she was asked to elaborate in detail her qualifications and background. The SAP then short-listed two candidates, including the Applicant, but reached no consensus as to which one should be given preference and referred the matter to the APC.

On 24 October 1989, the APC met to decide on recommendations for appointment to the post. According to the minutes of the meeting,

> "When the Selection Advisory Panel had met to discuss the case of [the] Senior Statistical Assistant, there was no consensus. The supervisor of the post favoured the appointment of [another staff member] while the APC representative did not finally come to a decision on who would be best suited. The case was therefore, brought to the full Committee for a recommendation...
>
> In reviewing the documentation presented, it was noted that of the twelve applicants for the post, attention was focussed on two, [the Applicant] and ... [The Applicant] is a core staff member serving as Senior Statistical Clerk at the G-5 level, with some eighteen years service with the Organization, ten of which have been in the Statistical Section. While she does have familiarity with some of the duties of the post, it was felt that she did not have the necessary knowledge nor experience in the advanced computer functions which were critical for this post."

The APC also interviewed the supervisor in charge of the post to explain the level of technical expertise required of the occupant.

The APC recommended that the other candidate be appointed. The Executive Director accepted that recommendation. According to the Applicant, she never received an official communication that she had not been selected for the post.

In a letter dated 19 December 1989, the Applicant requested the Secretary-General to review the administrative decision not to select her for the post of Senior Statistical Assistant. On 30 January 1990, the Deputy Executive Director replied on behalf of the Executive Director, that, "after an examination of the documentation, we consider that all candidates for the post, including yourself, were carefully reviewed in accordance with UNICEF's established procedures and with complete regard to due process. The decision to appoint another candidate was taken by the Organization as a result of a fair and objective review process by your peers and we are satisfied that the decision was taken properly".

On 27 February 1990, the Applicant lodged an appeal with the Joint Appeals Board (JAB). The Board adopted its report on 12 December 1990. Its considerations, conclusions and recommendations read as follows:

"Considerations

...

19. The Panel ... concluded that the vacancy notice for post 00666 had not announced a criterion which had nevertheless been applied in the selection process and led to the disqualification of the appellant. This, in the Panel's view, constituted unfair treatment which called for redress. The appellant, through her counsel, had requested the JAB to recommend that the appellant be assigned a post equivalent to post 00666. The Panel considered that it could not make such a recommendation as it might require UNICEF to create a post for which there was no need. The Panel concluded that monetary

compensation would be a more appropriate remedy and that three months net base salary would constitute an appropriate amount.

20. While unable to recommend the assignment to Appellant of a post equivalent to post 00666, the Panel felt that it should do its best to insure by an appropriate recommendation that the Appellant would stand at least as good a chance as any other candidate to be assigned to any other G-7 post which might become available and for which she was qualified.

21. Finally, at the Panel's hearing, the Appellant had expressed her interest in having her case serve to prevent the issuance of misleading vacancy notices in future. The Panel agreed that a recommendation to this end would be appropriate.

Conclusions and recommendations

22. Having concluded that the Appellant was unfairly treated in that she was found not qualified for post 00666 by reason of the application of a criterion not announced in the vacancy notice for that post, the Panel recommends that, by way of redress, the Appellant be paid the equivalent of three months net base salary.

23. While unable to recommend the assignment to the Appellant of a post equivalent to post 00666, the Panel recommends that full and fair consideration be given to any candidature of the Appellant for any appropriate vacancy at the level of post 00666 that might arise in UNICEF.

24. Concerned that problems such as had arisen in the present case be avoided, the Panel recommends that UNICEF take particular care that vacancy notices be clear as regards the criteria by which candidates will be judged and that the special skills required match the duties and responsibilities of the posts concerned."

In a letter dated 25 January 1991, the Under-Secretary-General for Administration and Management informed the Applicant that the Secretary-General had re-examined her case in the light of the Board's report, and had decided as follows:

> "... in accordance with the recommendation made by the Board in paragraph 23 of its report, full and fair consideration be given to any candidature you may submit for any appropriate vacancy at the level of the post of Senior Statistical Assistant No. 00666. He has also decided to accept the recommendation made by the Board in paragraph 24 of its report.
>
> At the same time, the Secretary-General has decided not to accept the recommendation made by the Board in paragraph 22 of its report. The selection for the filling of the post in question was made in accordance with the recommendation of the Appointment and Placement Committee which concluded that you were not the best candidate for the job. In the circumstances, any supposed lack of clarity in the vacancy announcement does not, in the view of the Secretary-General, constitute grounds for compensation."

On 18 December 1992, the Applicant filed with the Tribunal the application referred to earlier.

Whereas the Applicant's principal contentions are:

1. The APC based its decision on a finding that the Applicant did not have the necessary knowledge or experience in "advanced computer functions" which were critical for the post. However, knowledge and experience in advanced computer functions was not specified in the vacancy announcement or the job description. The decision of the APC was based on extraneous factors and was therefore discriminatory against and prejudicial to the Applicant.

2. The Applicant had sufficient knowledge and experience for the post. The APC did not give sufficient consideration to the fact that the Applicant had completed a database training course one year prior to the selection process.

3. In making its recommendations, the APC did not properly apply policies with respect to the advancement of women in the Organization.

Whereas the Respondent's principal contentions are:

1. The Administrative Tribunal should not substitute its own judgement for that of the appointment and promotion bodies and should not intervene in decisions based on the recommendations of such bodies, except in cases of non-observance of a regulation or rule, improper motive, prejudice or a denial of due process.

2. The APC considered the Applicant's candidacy thoroughly. Its recommendation, which was accepted by the Executive Director, fully respected the Applicant's rights and was consistent with the vacancy notice. The decision was not influenced by extraneous factors, bias or prejudice and the Applicant was not denied due process.

3. The decision did not violate any rule or regulation, or right of the Applicant, with respect to the advancement of women in the Organization.

The Tribunal, having deliberated from 14 June to 2 July 1993, now pronounces the following judgement:

I. The Applicant requests the Tribunal to find that the decision not to select her for the post of Senior Statistical Assistant in UNICEF was flawed because of extraneous considerations. She also requests the Tribunal to determine that the decision was tainted by prejudice and was affected by procedural mistakes. The Applicant further requests the Tribunal to declare that she was denied due process through procedural irregularity in the selection process and that she was treated in an arbitrary and discriminatory manner.

Finally, the Applicant requests the Tribunal to order the Respondent to pay her damages in the amount of one year of her salary and to assign her to a post with a grade equivalent to the post of Senior Statistical Assistant.

II. The Tribunal considers that the main issue in this case is whether any right of the Applicant, who had applied for the post

of Senior Statistical Assistant, was violated by the decision of the Respondent to appoint a candidate other than the Applicant.

III. The Applicant asserts that her "experience ... clearly indicates that she was well suited" to the Senior Statistical Assistant post. However, the New York Appointment and Placement Committee (APC) recommended that another candidate be appointed, and the Executive Director accepted that recommendation. The Tribunal notes that, according to the Applicant, she never received an official communication to the effect that she had not been selected.

IV. The Tribunal has held that as far as promotions are concerned, the general rule is that they are subject to the discretion of the Secretary-General and that, "consequently, qualifications, experience, favourable performance reports and seniority are appraised freely by the Secretary-General and therefore cannot be considered by staff members as giving rise to any expectancy". (Cf. Judgements No. 312, Roberts (1983), para. II and No. 554, Fagan, (1992), para. VIII). The Tribunal would not substitute its view for that of the Secretary-General concerning the evaluation of the Applicant's qualifications.

V. In the present case, the Tribunal must, however, establish whether improper motive, breach of procedure or any other extraneous factors have vitiated the contested decision. The Applicant claims that the Administration mishandled both the advertising of and the selection for the post. It had applied to it criteria not mentioned the Vacancy Announcement. The question to be determined by the Tribunal is what criteria the APC used when it made its recommendation.

VI. The Tribunal finds that the only authoritative information on that matter is provided by the minutes of the APC meeting (undated), the relevant parts of which read:

> "As stated in the job description, the person selected should not only have a thorough knowledge of computer systems, but should also have considerable familiarity with the systems currently in place in the Statistical Section. Additionally, it was mentioned that a new VS system for the whole PBA (Programme Budget Allotment) system is being implemented in 1990. The selected candidate will be wholly responsible for maintaining the PBA system, and should therefore be fully conversant with the range of duties involved.
>
> ... [The Applicant] is a core staff member ... with some eighteen years service with the Organization, ten of which have been in the Statistical Section. While she does have familiarity with some of the duties of the post, it was felt that she did not have the necessary knowledge nor experience in the advanced computer functions which were critical for this post." (emphasis added).

VII. In the view of the Tribunal, the minutes of the APC show that in dealing with the Applicant's candidature, the APC treated the possession of knowledge and experience in advanced computer functions, as a criterion for selection. It declared that the Applicant was not qualified for the post of Senior Statistical Assistant. However, the APC did not apply this criterion as a standard of comparison with other candidates

VIII. The Tribunal holds that the Vacancy Announcement dated 16 June 1989, should have contained complete information indicating that applicants were required to have knowledge and experience in advanced computer functions in order to be successful. A close scrutiny of the Vacancy Announcement shows that the notice issued was incomplete and misleading. While the drafters of the notice might have assumed that knowledge and experience in advanced computer functions were required for the performance of the duties and responsibilities of the post, the Tribunal notes that, under the heading "Minimum qualifications required for the post" in the Vacancy Announcement, there is no reference to knowledge and experience in advanced computer functions. In the opinion of the Tribunal, that was an obvious

lacuna and not merely a "lack of clarity in the vacancy announcement", as acknowledged by the Respondent, who asserts that it does not constitute grounds for compensation. The Tribunal does not concur with this assertion and agrees with the JAB's conclusion that the Applicant was unfairly treated.

IX. In this context, the Tribunal recalls that the UNICEF Personnel Administration Manual in volume 1, chapter 4, section 3, page 7, states:

> "4.3.2 In order to conduct a thorough review of candidates involving the matching of a candidate's particular areas of expertise to the requirements of the vacant post, a job description is required for each post in UNICEF. In addition to detailing the specific duties and responsibilities of the particular post, in its national environment, this description also contains the minimum requirements in terms of academic and/or professional qualifications and years of relevant working experience considered necessary to effectively carry out the duties of the post ...
>
> 4.3.3 Supervisors are reminded that as the job description is the main document against which the matching of candidates takes place, it is essential that a well prepared and up-to-date job description be submitted for each vacant post ... Staff in RSDS have been instructed by the Director, Division of Personnel to initiate the recruitment process only when job descriptions are up-to-date".

X. In the light of these specific requirements, the Tribunal has examined the job description of the post, together with the Vacancy Announcement and has found that neither of them mentioned advanced computer functions. Accordingly, the Tribunal concludes that the relevant UNICEF guidelines were not observed. The failure to include knowledge of advanced computer functions in the job description and in the Vacancy Announcement and the introduction this criterion during the selection process, constitute procedural irregularities which led to unfair treatment of the Applicant. The Tribunal finds that because of these irregularities, the interests of the Applicant were

not fully protected and she is therefore entitled to compensation.

XI. The Tribunal notes that the Secretary-General has accepted and supports the recommendation for the future made by the JAB, that "UNICEF take particular care that vacancy notices be clear as regards the criteria by which candidates will be judged and that the special skills required match the duties and responsibilities of the posts concerned."

XII. The Applicant alleges that the selection for the post was defective because extraneous considerations were at the root of the selection process; that the decision was tainted with prejudice, and that "UNICEF did not comply with existing policies and guidelines affecting the career development of the Applicant, who is a woman." In this connection, the Tribunal notes that the Selection Advisory Panel which met on 6 September 1989 and interviewed the Applicant short-listed two candidates, including the Applicant. It reached no consensus as to which one should be given preference. On 24 October 1989, the APC decided to recommend another candidate and not the Applicant. The question is whether the decision to select another candidate was tainted by prejudice or motivated by extraneous factors. The Tribunal has consistently held that "the burden of proving prejudice or improper motivation rests with the Applicant ..." (Cf. Judgement No. 93, Cooperman (1965), para. XII). The Tribunal finds that the Applicant has not discharged the burden of proving discrimination, unfairness or improper motivation in connection with the decision not to select her. She has, however, shown procedural irregularities and denial of due process.

XIII. The Tribunal notes that, by a letter dated 25 January 1991, the Secretary-General informed the Applicant that he had decided, in accordance with the JAB recommendation, that full and fair consideration be given to any candidature she might submit for any appropriate vacant post at the level of Senior Statistical

Assistant. However, the Tribunal was informed, in response to questions put by the Tribunal, that the Applicant has not been promoted to the G-7 level.

XIV. Taking into account the totality of the circumstances in the present case, the Tribunal decides that the Applicant is entitled to compensation, which the Tribunal assesses in the amount of three months of the Applicant's net base salary at the rate in effect on the date of this Judgement. In addition, the Tribunal expresses the hope that in order to redress the injury sustained by the Applicant, she will receive full and fair consideration for promotion, at the earliest possible date, to a vacant post at the G-7 level, for which she is qualified and in which she may be interested.

XV. For the foregoing reasons, the Tribunal:

1. Orders that the Applicant be paid a sum equivalent to three months of her net base salary at the rate in effect on the date of this Judgement.

2. Decides that all other claims be rejected.

(Signatures)

Samar SEN
Vice-President, presiding

Ioan VOICU
Member

Francis SPAIN
Member

Geneva, 2 July 1993

R. Maria VICIEN-MILBURN
Executive Secretary